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No. 76-886

In the Supreme Court of the United States

OCTOBER TERM, 1976

CLARK J. UMENTUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 547 F. 2d 987. The opinion of the district court (Pet. App. 33a-35a) is reported at 401 F. Supp. 746.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1976. The petition for a writ of certiorari was filed on December 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by a count in the indictment that charged both possession of a controlled substance with intent to distribute and the distribution of a controlled substance.

2. Whether the jury must find the commission of an overt act to support a conspiracy conviction under 21 U.S.C. 846.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on one count of conspiring to possess and distribute cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846 and 18 U.S.C. 2, and on one count of possessing with intent to distribute and distributing 878.5 grams of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of seven years' imprisonment on each count, to be followed by a three-year term of special parole. The court of appeals affirmed (Pet. App. 1a-13a).

Following two telephone conversations in April 1975 between a special agent of the Drug Enforcement Administration and one of petitioner's co-defendants, a meeting was arranged for the purpose of purchasing 25 ounces of cocaine for $40,625. Two special agents thereafter met with petitioner and other co-conspirators at a restaurant. Following initial negotiations for the purchase of cocaine, the men went to the parking lot of the restaurant. There, petitioner opened the trunk of a car and showed the agents a plastic bag of white powder that petitioner represented to be cocaine. Petitioner and his confederates were then placed under arrest and the bag of white powder was seized[1] (Tr. 229-270, 372-375).

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[1]Petitioner premised his defense at trial upon the theory that the tests performed by the government chemist were insufficient to establish the identity of the material involved as a controlled substance (Brief for Appellant, p. 2). He does not now repeat this challenge.

ARGUMENT

1. Petitioner contends (Pet. 4, 5-6) that count II of the indictment is duplicitous because it charges separate offenses, *i.e.*, possession of a controlled substance with intent to distribute and distribution of a controlled substance.[2] The court of appeals rejected this claim on the ground that possession and distribution of a controlled substance are different means of violating the same statute (Pet. App. 4a, 31a-32a; see *Turner* v. *United States*, 396 U.S. 398, 420).[3] We recognize that there is an apparent disagreement among the circuits whether possession with intent to distribute and distribution should be charged in separate counts or a single count.[4] But there is no need to resolve the issue in this case.

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[2]Count II charged that petitioner and others "did knowingly, wilfully, and unlawfully possess with intent to distribute and did distribute approximately 878.5 grams (gross weight) of cocaine, a Schedule II Narcotic Drug Controlled Substance, all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2."

[3]The court instructed the jury that in order to convict under count II, it must find, *inter alia*, that the government established that "the defendants distributed or possessed with intent to distribute a controlled substance * * *" (Tr. 1188; see Tr. 1226).

[4]The Fifth Circuit has held that possession with intent to distribute and distribution may be charged in separate counts and may constitute separate offenses. *United States* v. *Horsley*, 519 F. 2d 1264, 1265-1266 (C.A. 5), certiorari denied, 424 U.S. 944; see also *United States* v. *Costello*, 483 F. 2d 1366, 1368 (C.A. 5); cf. *United States* v. *Gonzalez*, (C.A. 2), certiorari denied, January 10, 1977 (No. 76-5555). The Sixth and Fourth Circuits have also adopted this position, although those circuits have held that, where there is no evidence of possession apart from the actual distribution, the offenses merge for purposes of sentencing. *United States* v. *Stevens*, 521 F. 2d 334, 337 (C.A. 6); *United States* v. *Curry*, 512 F. 2d 1299, 1306 (C.A. 4); *United States* v. *Atkinson*, 512 F. 2d 1235, 1240 (C.A. 4).

The court of appeals here, on the other hand, appears to have aligned itself with the Tenth Circuit, which takes the position that possession

The principal vice of duplicity is that it may not be clear whether a general verdict of guilty represents the unanimous view of the jury that the defendant committed one or more of the acts charged (see Pet. App. 30a). That vice is not present in this case. The evidence here showed that the cocaine was in the trunk of a car and that petitioner removed the cocaine from the car in the agent's presence. Given the preexisting agreement that petitioner was going to sell the cocaine to the agent, the jury had a sound basis to conclude that petitioner possessed the drug with intent to distribute.[5] Moreover, as the district court found (Transcript of proceedings upon imposition of sentence, p. 45):

> [U]nder the evidence presented in this case, no member of the jury could have found the defendant guilty of distribution without [also] believing the evidence which itself established possession with intent to distribute. * * *

Thus, the verdict in this case necessarily represented the unanimous view of the jury that petitioner possessed

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and distribution of a controlled substance are merely different means of violating the same statute and thus must be charged in a single count. *United States* v. *Herbert*, 502 F. 2d 890 (C.A. 10), certiorari denied, 420 U.S. 931. Accord, *United States* v. *Hobbs*, 392 F. Supp. 444 (D. Mass.); *United States* v. *DiLaura*, 394 F. Supp. 770 (D. Mass.).

In our brief in opposition in *United States* v. *Gonzalez*, *supra*, a copy of which we are sending to counsel for petitioner, we took the position that possession and distribution of a controlled substance may properly be charged as separate offenses. (It should be noted, however, that in *Gonzalez* there was substantial evidence of possession other than at the time of the actual distribution, whereas here the charges of possession and distribution both involve the arrangement to sell cocaine described above.)

[5]Correspondingly, there was little, if any, evidence to sustain the charge that the cocaine had been distributed to the agents. Petitioner and his co-conspirators were arrested before either the purchase money or the cocaine changed hands.

cocaine with the intent to dictribute it. Cf. *United States* v. *Gaddis*, 424 U.S. 544, 549. As the district court stated (Transcript of proceedings upon imposition of sentence, p. 45): "there was no opportunity for the defendant to be prejudiced by a non-unanimous conviction * * *." Accordingly, petitioner suffered no prejudice by inclusion of both charges in count II, whether or not the count was duplicitous. See also *United States* v. *Natelli*, 527 F. 2d 311, 325 (C.A. 2).

2. Petitioner also contends (Pet. 7) that it was error for the district court to fail to instruct the jury that it had to find the commission of an overt act in furtherance of the conspiracy in order to convict on the conspiracy charge. Unlike the general conspiracy statute (18 U.S.C. 371), however, 21 U.S.C. 846 by its terms requires neither allegation nor proof of an overt act in furtherance of the conspiracy.[6]

At common law, an overt act was not an essential element of the crime of conspiracy, and this Court has long recognized the power of Congress to adopt a conspiracy statute that does not require the commission of such an act. *Fiswick* v. *United States*, 329 U.S. 211, 216; *Singer* v. *United States*, 323 U.S. 338, 340; *Nash* v. *United States*, 229 U.S. 373, 378. Those courts that have considered the issue under the statute that preceded Section 846 (21 U.S.C. (1964 ed.) 174) have uniformly ruled that it did not require any allegation or proof that

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[6]21 U.S.C. 846 states in relevant part: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable * * *." 18 U.S.C. 371, by contrast, reads in relevant part, "If two or more persons conspire * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined * * * or both."

overt acts were committed in furtherance of the conspiracy.[7] As there is no indication that Congress intended to change this interpretation in reenacting that provision as 21 U.S.C. 846 (see *United States* v. *Beasley*, 519 F. 2d 233, 247 (C.A. 5), and cases there cited), the court of appeals here properly followed the preexisting approach in declining to impose a requirement of proof of an overt act. As the court said (Pet. App. 7a):

> An overt act * * * need not be charged in a § 846 conspiracy. If an overt act need not be charged, it need not be proved. If an overt act need be neither charged nor proved, there remains nothing about which to instruct on that issue.

Accord, *United States* v. *DeJesus*, 520 F. 2d 298, 301 (C.A. 1), certiorari denied, 423 U.S. 865; *United States* v. *Beasley, supra; United States* v. *Miller*, 387 F. Supp. 1097, 1100 (D. Conn.); *United States* v. *DeViteri*, 350 F. Supp. 550, 551-552 (E.D. N.Y.). See also *United States* v. *De Lazo*, 497 F. 2d 1168, 1171 (C.A. 3).

We agree with petitioner (Pet. 7) that the Tenth Circuit's brief *per curiam* decision in *United States* v. *King*, 521 F. 2d 61, 63, (C.A. 10), conflicts with the holding of the court of appeals here. In *King*, the Tenth Circuit recognized that "an indictment under section 846 need not allege overt acts," but the court nevertheless held that the jury must be instructed that the government must prove such acts to make out a

[7] *United States* v. *Murray*, 492 F. 2d 178, 192 (C.A. 9), certiorari denied, 419 U.S. 942; *Hopkins* v. *United States*, 405 F. 2d 770, 772 n. 2 (C.A. 9); *United States* v. *Garfoli*, 324 F. 2d 909 (C.A. 7); see *United States* v. *Beasley*, 519 F. 2d 233, 247 (C.A. 5).

conspiracy under that statute.[8] However, this case is not an appropriate one in which to resolve the conflict, since there is no possibility that petitioner was prejudiced by failure to follow the Tenth Circuit's view. The evidence at trial showed that petitioner possessed and attempted to sell cocaine. Those acts, which the government necessarily must have proved to obtain the conviction on count I of the indictment, also constitute the overt acts that petitioner claims must be proved to support his conspiracy conviction. Thus, even if the instructions on the conspiracy charge were insufficient, the defect was a technical one that could not have affected the verdict.

Moreover, we note that petitioner received equal concurrent sentences on both counts of the indictment, and petitioner's claim regarding the conspiracy charge does not impugn the integrity of the conviction on the substantive count. Thus, as a matter of judicial convenience the Court need not reach this issue. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

[8] In reaching that result the Tenth Circuit did not consider the contrary holdings of the other circuits; moreover, it relied on two earlier decisions in which the issue was not in fact before the courts. In *United States* v. *Jackson*, 482 F. 2d 1167 (C.A. 10), certiorari denied, 414 U.S. 1159, the only issue regarding the conspiracy count (which was brought under 21 U.S.C. 963, not Section 846), was whether the district court should have instructed the jury on multiple conspiracies. In *United States* v. *Thomas*, 468 F. 2d 422 (C.A. 10), the court assumed the need for proof of an overt act in ruling that the evidence was sufficient to establish that the defendants were part of an ongoing conspiracy under 21 U.S.C. 174.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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